

A Preliminary Report on the Bakke Case

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Introduction

A full generation has passed since racially "separate but equal" public schools were constitutionally condemned by a unanimous Supreme Court. During the intervening decades there have been many other race-related Supreme Court decisions, but none as momentous as *Brown v. Board of Education*. On June 28, 1978, however, a case to rival *Brown* in the sheer intensity of public interest came down—the case everyone knows simply as "Bakke." The question it decided was whether racially separate and unequal admission standards are also constitutionally condemned. From there on, however, the similarity of *Bakke* to *Brown* ends.

The lapse of years between *Brown* and *Bakke* is reflected on the face of their very different opinions. In condemning compulsory racial school segregation, *Brown* spoke with a confident and unanimous simplicity. In retrospect, perhaps it is to be faulted on that account, although I have not seen in all the critiques of *Brown* a work product overall more effective than the original succinct opinion. *Bakke*, on the other hand, is a study in contrast in virtually every imaginable respect.

There is a "judgment" for the Court—but no opinion for the Court. Rather, there are six separate opinions, none on any issue representing the view of more than the barest majority. The outcome itself is by bare majority, five-to-four, but even that degree of consensus is deceptive. Four of the five justices on the prevailing side voted to affirm (in favor of Bakke) solely on the basis of a statutory interpretation *which all of the other five Justices rejected*. The fifth Justice on the prevailing side voted to affirm solely on the basis of his own interpretation of the fourteenth amendment *which four other Justices rejected and which the remaining four Justices declined to endorse*.

It is thus not inaccurate to say that the *Bakke* case was "decided" by one Justice (Mr. Justice Powell) on a rationale which, so far as it depended (as it did) on an interpretation of the Constitution, was a minority view

of one-to-four; and insofar as the case was "decided" by four Justices on the basis of a statutory interpretation (which it was), it represents a minority view of four-to-five! Small wonder that the immediately ensuing news specials, the evening of June 28th, seemed confusing.

What follows is but a brief résumé of the case in its principal features plus some observations respecting its immediate implications for the academic community.

A Summary of the Case

The University of California opened a new medical school at its Davis campus in 1968. As of 1973, the medical school had established a dual admissions process: one for regular applicants, open to applicants of all races, from whom the best would be selected on the basis of grades, test scores, and interview results, to fill eighty-four places in the freshman class; another for special applicants, limited to blacks, Chicanos, Asians, and American Indians unlikely to be admitted in competition with the regular applicants, from whom the best would be selected on the basis of grades, test scores, and interview results, to fill sixteen places in the freshman class.

A reasonably accurate description of the second admissions process might be to call it a "minimum racial minority set-aside." It was plainly not a maximum racial minority quota, as of course applicants of all races were considered on completely equal terms within the regular admissions process. (In fact, for 1973 and 1974 combined, twenty-four racial minority students [most of whom were Asian] were among the 168 enrolled pursuant to that process—14 per cent of the total.) Neither was it exactly a minimum racial minority quota: the medical school was not determined to fill it "at all costs," but only to the extent that those eligible for consideration were deemed capable of coping with the regular curriculum, once admitted. In 1973 and 1974 alike, however, a full complement of sixteen students was admitted in each year pursuant to this second admissions process.

Allan Bakke applied in 1973 and 1974 to be admitted. Whether he would have been admitted but for the 16 per cent racial minority set-aside cannot be known. In

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comparison with others admitted under the regular process, he was deemed less qualified—but not at all much less so. Indeed, the university conceded that had he been considered on equal terms with all other applicants for the full complement of 100 places (rather than the lesser complement of 84 places) each year, he might in fact have been among the best 100; *i.e.*, the university conceded that it could not show that even had it not reserved 16 places each year as a separate, racial minority set-aside, Allan Bakke would still have been rejected.

Objectively, moreover, a comparison of Allan Bakke's admission statistics (exclusive of his interview scores) with the average of the sixteen special admittees for each of the two years in which he was rejected and in which they were all accepted, is striking:

Medical College Admission Test (Percentiles)						
	Science GPA	Overall GPA	Quantitative	Verbal	Sci- ence	Gen'l Info.
1973						
Bakke	3.44	3.51	96	94	97	72
16 Others (av.)	2.62	2.88	46	24	35	33
1974						
Bakke	3.44	3.51	96	94	97	72
16 Others (av.)	2.42	2.62	34	30	37	18

No other useful comparison can be made between any other qualifications Allan Bakke may (or may not) have had. No such comparison is possible because the Davis Medical School made none and, indeed, arranged its admissions procedures in such a fashion that none could be made. A wholly different committee from that which interviewed each of the sixteen special admittees interviewed Allan Bakke; no attempt was made to standardize the interview ratings employed by the different committees—because the special admittees were not meant to be compared either “objectively” or “subjectively” with Allan Bakke, but only with each other. (Even as things were, however, applicants admitted under the special program included a significant number whose “bench-mark scores” —inclusive of points added on the strength of information elicited pursuant to the interview process—were “significantly lower” than Allan Bakke's bench-mark score.)

Displaced from admission under these circumstances, Allan Bakke challenged the legality of the school's racial double standards (*i.e.*, the more highly competitive one for all “regular” applicants, the emphatically less competitive one available only to disadvantaged blacks, Chicanos, Asians, and American Indians) in a California Superior Court. He did so on three distinct grounds each of which, he alleged, forbade the unequal treatment to which he had been subjected. The first was the following provision as it then appeared (in 1974) in the California Constitution:

[N]or shall any citizen, or class of citizen, be granted privi-

leges or immunities which, upon the same terms, shall not be granted to all citizens.

The second was the following provision from Title VI of the federal Civil Rights Act of 1964:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The third was the equal protection clause of the fourteenth amendment to the Constitution:

[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

The Superior Court held against the Medical School on all three grounds, enjoining the use of race for admissions purposes, but declining to order Allan Bakke's admission because of uncertainty whether he necessarily would have made it into the class in either year even in the absence of the special admissions program. On appeal (by both parties), by a vote of six-to-one the California Supreme Court affirmed solely on the basis of the fourteenth amendment, ordering Bakke's admission because the University was unable to show that without its (unconstitutional) program, Bakke would not have made it. In short, the California Supreme Court held that it was the University's burden to show, if it could, that its unconstitutional use of race was without impact upon Alan Bakke's admission, and not the reverse.

In the Supreme Court (which stayed the order admitting Bakke until the Court decided the merits of the case), only the federal questions (Title VI and the fourteenth amendment) were within the discretion of the Court to examine. The Justices divided in the following ways: First, four Justices (Stevens, Stewart, Burger, and Rehnquist) concluded that the fourteenth amendment question need not be addressed. Rather, they interpreted the quoted provision from the Civil Rights Act as a flat prohibition of any school which receives federal assistance from employing more rigorous admissions standards under which are excluded some students who might otherwise have been admitted but for the reservation of places for students judged by more permissive standards solely because of their race. Holding also that Title VI could be relied upon by a private litigant (and not simply by HEW for the purpose of withholding any federal assistance from an institution operating in violation of its “colorblind” requirement), they therefore voted to affirm the California Supreme Court strictly on this statutory ground. In brief, in their view Allan Bakke quite clearly had been “subjected to discrimination” on the basis of his race; such discrimination was plainly forbidden against anyone, white or black. It was clearly within the power of Congress so to provide in respect to any institution receiving federal funds, and the decision below should

therefore be affirmed without gratuitous speculation as to whether, in the absence of that controlling Act of Congress, some other applicable law or constitutional provision would require the same result.

The remaining five Justices concluded, however, that the Act of Congress was not conclusive *per se*. Rather, all of them interpreted Title VI to forbid only such uses of race as would otherwise be condemned by the equal protection clause of the fourteenth amendment; i.e., that despite its different wording, Title VI was meant to provide that institutions receiving federal funds were forbidden from using a racial double admission standard if, but only if, such a use would constitute a denial of "equal protection."

One of these five Justices, Mr. Justice Powell, concluded that the Davis plan did violate the equal protection clause (and thereby Title VI as well), thus ultimately placing his vote with the four Justices already holding in Allan Bakke's favor strictly on the basis of Title VI alone. Because Justice Powell concluded that race could be considered, albeit in a different fashion than it has been used at Davis, however, he voted to reverse that part of the California Supreme Court judgment forbidding any use of race. The other four Justices joined in an opinion written by Mr. Justice Brennan, concluding that the Davis plan did not violate the equal protection clause (and thus also did not violate Title VI), resulting in their decision to dissent.

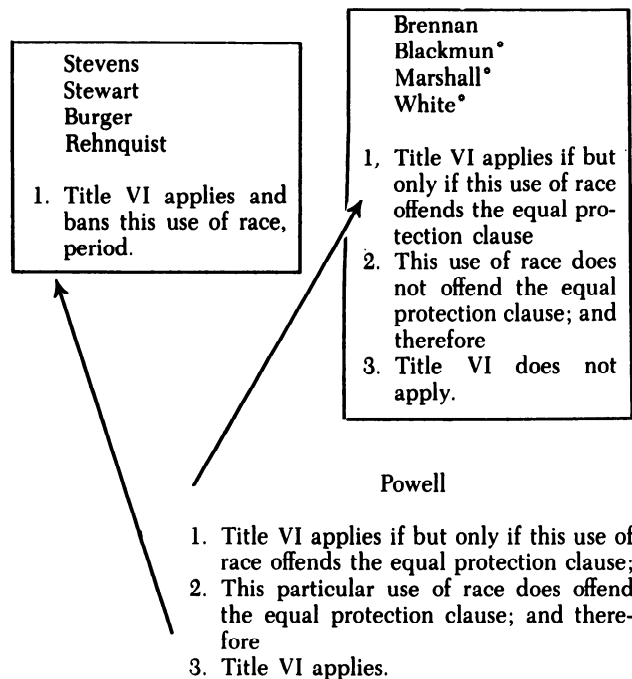
In addition to these three principal opinions, there were three others. Mr. Justice White, while fully concurring in Brennan's opinion (on the merits of the constitutional issue) wrote separately to record his view that the provision in Title VI could not serve to support a private cause of action; rather, in his view, loss of federal funds was the only sanction contemplated by Congress. Mr. Justice Blackmun fully concurred in Brennan's opinion, but added separate remarks of his own as to why, in his view, the Davis plan did not deny Allan Bakke the equal protection of the laws. Mr. Justice Marshall, also fully concurring in Brennan's opinion, added still more elaborate remarks of his own, defending the constitutionality of the Davis Plan.

More graphically, one correct perspective of the case is shown in the chart at right.

The Obvious Instability of the Decision

Whether anyone other than Allan Bakke will hereafter succeed in challenging racial preferential admission programs, or whether many may succeed in doing so, is utterly uncertain. Some of the reasons for this uncertainty are obvious, others far less obvious.

Among the obvious reasons are these. First, since four of the Justices on the prevailing side reached their conclusion solely on the basis of a strict "colorblind" interpretation of Title VI which, however, a majority of the Court in fact rejected in the same case, there is no reason to believe that any of these Justices would necessarily insist upon their minority interpretation of Title VI in any subsequent case. A majority of the Court has said that the provision in Title VI does no more than



Result: Decision below (in Allan Bakke's favor) affirmed, judgment below reversed insofar as it forbade any use of race. * (filed separate concurring opinions, but also joined the Brennan opinion)

forbid whatever uses of racial classifications are otherwise forbidden by the fourteenth amendment; that interpretation being the prevailing one in the *Bakke* case itself (so far as the statute was concerned), it would be entirely proper for any or all of the Justices holding a contrary view in *Bakke* hereafter to acquiesce in that construction.

Insofar as that may happen, then even in a case literally identical to the *Bakke* case (i.e., a case involving the very same kind of dual admission process as that which Davis used), Justices Stevens, Stewart, Rehnquist, and Burger may each, for the first time, have occasion to state their own view as to whether such an affirmative action plan is, or is not, compatible with the fourteenth amendment (and, by the same token, consistent also with Title VI). If but one of the four asserts a view more nearly in agreement with Brennan's opinion in *Bakke*, rather than more nearly in agreement with Powell's opinion in *Bakke*, the result in this, a case *literally the same as Bakke*, would change: from five-to-four, to four(or fewer)-to-five(or more)!

Second, there may be some public colleges or universities which, because they are state schools, are of course bound by the fourteenth amendment—but not bound by Title VI insofar as they provide no "program or activity receiving Federal financial assistance" to which the restrictions of Title VI apply. As to them, there being no Title VI basis upon which Justices Ste-

vens, Stewart, Rehnquist, or Burger could rely (even assuming they would persist in their "colorblind" interpretation of Title VI in every case where Title VI was applicable), each might then be compelled to address the legality of a Davis-type plan solely on the basis of the fourteenth amendment. Again, as explained above, if any one of them agrees with Brennan's more permissive view of racial preferential admission programs, all plans at all such public institutions *identical* to the Davis plan in *Bakke* would be upheld.

Third, none of the Justices addressing themselves to the fourteenth amendment issue took the view that the equal protection clause requires strict colorblindness even in respect to admission programs at state universities. (It is interesting that among the more than three-score *amicus* briefs filed in *Bakke*, moreover, not one asserted an absolute colorblind interpretation of the equal protection clause.) Indeed, the distance between Mr. Justice Powell's position respecting what use may be made of race for admission purposes and Mr. Justice Brennan's position is not terribly great. One such difference was this:

The Davis plan was defended on four grounds, one of which was that it reflected a not unreasonable attempt at social redress: i.e., that short-term favoritism of certain racial minorities not now fairly competitive with others for medical school admission is a wholly appropriate means of partial redress for disadvantages all persons identified as members of those minorities had been made to endure, in some degree, solely because of their race. That the Davis plan, viewed strictly as a conscientious effort toward such redress, might be imperfect did not on that account make it unconstitutional.

Mr. Justice Brennan (and the three Justices concurring in his opinion) found this justification adequate *per se* to sustain the Davis plan against fourteenth amendment complaint. Mr. Justice Powell disagreed—but not completely. Rather, what he said was:

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals *in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations*. . . . Petitioner [i.e., the University of California Board of Regents] does not purport to have made, and is in no position to make, such findings. . . . Before relying upon these sorts of findings in establishing a racial classification, *a government body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination*. [Emphasis added.]

In turn, Mr. Justice Brennan characterized "the central meaning of today's opinions" (clearly meaning not just his own but Powell's as well) in the following way:

Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, *at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area*. [Emphasis added.]

If, indeed, these passages represent "the central meaning" of the *Bakke* case, then presumably a racial-preference admission program *identical* to the Davis plan would be sustained by a minimum vote of five-to-four, assuming nothing different about the plan but something different only as to its origin and the plausibility of certain "findings" at that source. In *Bakke* itself, the Regents had denied that the University of California has ever discriminated against blacks, Chicanos, Asians, or American Indians. If, however, prior to another *Bakke* case the California legislature were to "re-examine" the legal and social history of that state, concluding with abundant illustrations that the state itself had in many specific ways since 1868 imposed race-related handicaps on these minorities (the task would be easiest by far in respect to "Asians"), inclusive of its educational systems (examples would in fact not be difficult to supply), the appropriate legislative predicate to sustain a Davis-type plan might well be laid. Indeed, it is not clear that the U.C. Board of Regents is itself precluded from doing so: that Board is a constitutional entity in California, quasi-legislative as well as administrative. At least so long as it confined itself to plausible findings of past inferior treatment of racial minorities within the University of California system itself (a matter it might, in Powell's words, be "in [a] position to make"), Davis-type plans might then be deemed "responsive to identified discrimination."

At the legislative level, moreover, it is not clear that the "findings" (for which varieties of state-authorized racial minority preference systems may be thought appropriate forms of redress) need necessarily be related to "constitutional or statutory violations" within California itself. After all, ours has been a highly mobile population, and it may not be in the least irrational to conclude that many blacks, Chicanos, and Indians, confined as they were to separate and *inferior* schools in many states prior to moving to California, reflect directly the handicaps unfairly resulting from *those* constitutional and statutory transgressions. Thus, should neither the Regents of the University of California nor the General Assembly of that State wish to enter findings of *mea culpa* respecting California in particular, still it might be possible to create a sufficient record permitting reinstatement of Davis-type plans.

In certain other states, moreover, Mr. Justice Powell's requirement of a "record" of "administrative findings of constitutional or statutory violations" by an appropriate agency clearly in a position to make such findings necessary and sufficient to sustain Davis-type plans on a pure redress theory can obviously be satisfied. For decades *after Plessy v. Ferguson*, for instance, it is demonstrable that in North Carolina the state operated separate *and unequal* schools. (We may tend to forget that, even among the four school systems involved in the original quartet of cases decided by the Supreme Court in 1954, three of them had been determined by the lower courts to be operating separate *and unequal* schools.) In brief, the "history" is doubtless there for those who deem it appropriate to use that

history for such purposes. So used, then again a plan identical to that at Davis may be deemed constitutional by at least five members of the same Court as that which decided in favor of Allan Bakke.

Finally, Mr. Justice Powell indicated that racial preferential admission standards in public and in federally assisted private colleges may be continued even *absent* any adequate record relating the felt necessity for such a plan to previous acts of discrimination against the racial groups to be favored. By coincidence, with but very slight modification, presumably the very plan held invalid in *Bakke* itself can readily be reinstated.

Justice Powell's opinion opens with an implied premise within the equal protection clause: "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." That is not to say, however, that all such distinctions are forbidden. Rather, it is to say that "in order to justify the use of a suspect classification [race], a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose."

One such purpose, Powell suggests, "is the attainment of a diverse student body" insofar as the overall quality of education provided within "an institution of higher education" is, in part, a function of the heterogeneity of the participants themselves. In this sense, under some circumstances "race" may be as much a merit-plus (albeit an adventitious one) as economic background, geographic origin, work experience, military experience, or age. A determination to build in a nontrivial presence of ethnically diverse students within an institution of higher learning or professional school is thus directly related to its proper and important function of providing the fullest measure of quality education. So, Powell declares:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

As a consequence, when racially indifferent standards of admission would tend to screen out persons whose absence may diminish the character and quality of the educational experience that it is the very function of the institution to provide, the school may take appropriate steps to count a particular "race or ethnic background . . . a 'plus' in a particular applicant's file," even as it may do so in respect to others according to their geographic background or some equally fortuitous but educationally germane consideration. In this sense, Mr. Justice Powell virtually acted upon the position urged in the AAUP *amicus* brief.

The resulting adjustments to the Davis plan implied by Justice Powell need not be very great. First, the faculty must identify those characteristics (which may

include, but presumably must not be restricted to, race) which, in its view, are educationally germane to a diverse student body. Second, it should review its (academic) admissions standards to determine whether, given the manner in which those standards may tend to eliminate all (or nearly all) persons having germane characteristics of a particular kind (race being one such characteristic), the standards should be modified to build in a sufficient "plus" for such applicants that a nontrivial number will show up in each entering class. Third, there should be no terminal dual or triple admission tracks of admission, but only one track within which applicants are considered—the suggestion being that a person in Bakke's position may well have acquired some "plus" of his own equivalent (albeit relating to a different quality) to some "plus" credited to another on racial grounds. Under these circumstances, "his qualifications [including any adventitious but nonetheless educationally germane qualifications] would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."

Looking back at the Davis plan, for comparison, several suggestions now seem obvious. First, since no significant numbers of blacks, Chicanos, or American Indians were admitted into the entering class when ethnic origin was left out of account entirely, doubtless substantial "plus" value may once again be assigned to all applications presented by such applicants. (Since a nontrivial number of "Asians" was admitted into the entering class without benefit of any such "plus," however, continued assignment of such a "plus" on that basis presumably will lack adequate justification.) Second, in order that the plan pass muster as a *bona fide* "educational diversity" plan (and not merely a more doubtful, more narrowly based "racial diversity" plan), other kinds of attributes need to be identified and other applicants possessing such attributes to be given "plus" points of their own sufficient also to produce a nontrivial presence of persons with those attributes in each entering class. With these modifications, racial preferential admission programs providing more favored treatment to ethnic minority students applying at predominantly white institutions will evidently be deemed acceptable to not fewer than five Justices both under Title VI and under the fourteenth amendment. We may briefly summarize the "instability" of the *Bakke* case, then, as follows:

1. Under either of two circumstances, a plan *identical* to that in *Bakke*, a Davis-type plan providing a special designated racial minority set-aside, may be held lawful:

(a). If, in a case involving a public university but not involving Title VI, either Stevens, Stewart, Rehnquist, or Burger acquiesces in Mr. Justice Brennan's view of the fourteenth amendment which is already shared by three other Justices:

(b). If, in a case involving a public university subject to Title VI or a private university subject to Title VI, either Stevens, Stewart, Rehnquist, or Burger acqui-

escues in what is already a majority's interpretation of Title VI (i.e., that it forbids only what the fourteenth amendment forbids), and also acquiesces in Mr. Justice Brennan's view of the fourteenth amendment.

2. A Davis-type plan may also be upheld even in the absence of either condition noted above, assuming only that appropriate findings are provided by a competent judicial, legislative, or administrative source, relating the plan as an appropriate remedy for identified discrimination against such racial minorities.

3. In the absence of any of the above, a university subject to Title VI and/or the fourteenth amendment may nonetheless take race into account as a "plus" factor under circumstances where such consideration is a necessary means of providing reasonable ethnic diversity within the student body, as one of several kinds of "nonacademic" diversity which it believes contribute to the overall educational excellence of the institution.

Two Countervailing Possibilities

Despite what has been said thus far, there are at least two grounds on which racial preferential admissions programs in private and public institutions may nonetheless be held illegal, even when remodeled in keeping with Mr. Justice Powell's opinion. First, it must be borne in mind that in *Bakke* itself, the Supreme Court reviewed the case to reexamine the legality of the Davis plan solely in terms of federal, rather than state, laws. The Court passed only on the reconcilability of the plan with Title VI and with the fourteenth amendment; it did not pass on its compatibility with any other federal statutes (which Bakke's attorney might have overlooked in first bringing the case).

Second, the reader will recall that Allan Bakke originally relied on an express provision in the California Constitution, quite apart from his reliance upon Title VI and the fourteenth amendment—and that the California Superior Court held in Bakke's favor on *this* ground, as well as the two federal grounds. Thereafter, however, the state constitutional issue disappeared from the case: the California Supreme Court did not rely upon it, but neither did it disapprove the use made of it by the Superior Court. Rather, the state Supreme Court affirmed the decision of the Superior Court solely on the basis of its view of the fourteenth amendment—leaving utterly unsettled whether the Superior Court was also correct in its interpretation of the state constitution, or whether Bakke might have won under some other provision of state law.

Similarly, the United States Supreme Court said nothing respecting the proper interpretation or application of that state constitutional provision. Indeed, in nearly all circumstances, the United States Supreme Court deems itself incompetent to decide such questions (i.e., doubtful questions respecting the meaning—as opposed to the federal constitutionality—of state laws, including state constitutional law). Rather, unless an interpretation by a state supreme court of a state constitutional provision brings that provision into conflict with some overriding federal law (or unless the

state supreme court construes a state constitutional provision as having the same meaning as a parallel provision in the federal constitution), the general practice of the United States Supreme Court is to refuse to review not only the state constitutional provision (which it has no expertise superior to that of the state's own highest court to interpret), but also the case itself.

The reason for this general practice is quite plain and can be illustrated by reference to the *Bakke* case. If the Supreme Court of California were to hold that, regardless of what the fourteenth amendment would permit the Davis Medical School to do in its use of race, the California Constitution commits the state and all of its instrumentalities to a strict "colorblind" standard, then that holding fully adjudicates the controversy, renders it gratuitous to address any other issue, and puts a final end to the litigation.

The fact is, therefore, that institutions utilizing race as a factor which operates to deny to any person that which they might otherwise have been eligible or entitled to receive, may still confront separate restrictions arising from "mini-equal-protection clauses" in the constitutions of the states in which those public institutions are located. While it would be surprising if many such state constitutional provisions were construed in such a fashion, by no means would it be without precedent. In recent years, a number of state high courts (including most of all the California Supreme Court) have declined to read parallel state constitutional provisions as yielding only the same kind of "due process" or "equal protection" as the United States Supreme Court has more conservatively interpreted those phrases in the fourteenth amendment. Ironically, Mr. Justice Brennan has himself written a lengthy article urging state supreme courts to take a more lively and independent view of the generally moribund subject of state constitutional law. It bears attention, then, that the possibility of such a development further complicates the post-*Bakke* era.

There is yet another countervailing possibility as well, to be sure so remarkable that indeed it may call down a full-throated cry: "The first thing we do, let's kill all the lawyers." Quite apart from the two federal sources of law relied upon by Allan Bakke (successfully, as it turned out), i.e., Title VI and the equal protection clause of the fourteenth amendment, there remain other federal statutes in the field. One of these is itself subject to an interpretation that it imposes a strict "colorblind" standard on all colleges and universities in determining admissions, whether those colleges are private (rather than public), and whether or not they are recipients of federal financial assistance. The statute (42 U.S.C. § 1981) reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens

In 1968, a majority of the Supreme Court construed this

federal statute not simply to invalidate state laws disabling black persons from making enforceable agreements (the statute dates from the Reconstruction era), but to provide a private cause of action against private refusals to contract with black persons when the refusing party would have been willing to make the same contract with a white citizen. In 1976, moreover, the Supreme Court held that § 1981 is applicable to schools in respect to their admissions policy, i.e., that a refusal to admit a black person under circumstances where a white citizen would be admitted denies to that black person "the same right . . . to make and enforce contracts" (of matriculation). The cases in which these matters were settled were *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976).

The case of most immediate significance, however, is a third case which appears to hold that, despite its wording, § 1981 is a "two-way street," i.e., that it equally forbids racial discrimination against white persons (and in favor of black persons) as it forbids racial discrimination against black persons (and in favor of white persons). The case is *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Mr. Justice Marshall concluded (at p. 295):

[T]he Act was meant . . . to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.

Neither the *Runyon* case nor the *McDonald* case was available when Allan Bakke's case was first filed, in 1974. Thus, it is not surprising that his complaint failed to challenge the Davis plan under § 1981, quite apart from the challenges brought under the California Constitution, Title VI, and the fourteenth amendment. Correspondingly, there is nothing the least remarkable in the fact that the possible application of § 1981 to racial preferential admission programs (whether of the Davis type or of the more general, "diversity" type approved by Mr. Justice Powell) was not dealt with in *Bakke*.

The appearance of these cases plus the dictum by Mr. Justice Marshall in the *McDonald* case does, nonetheless, raise one more item of instability regarding the uncertain implications of *Bakke*. Here, however, unlike the possible state supreme court "colorblind" interpretations of state constitutions (a possibility that I do think is not a remote one), it is not likely that § 1981 would be applied with the full force of the Marshall dictum in the *McDonald* case or, at least, not in a manner forbidding "diversity" type plans approved by Mr. Justice Powell. A careful reading of Mr. Justice Brennan's opinion will be convincing to any reader, I think, that neither he nor the other three Justices (including Marshall) would construe § 1981 in any fashion to forbid any kind of admissions program not otherwise inconsistent with his view of the equal protection clause. The same may very well be true of Mr. Justice Powell—especially as the kind of program he finds constitutional is one that does not "favor" blacks as a class,

but rather favors varieties of diversity (of which ethnicity is but one) only when indifference to such matters would otherwise result in an educationally less desirable (because unduly homogeneous) student body. Even as to the four Justices holding in favor of Bakke on the strength of the plain meaning of Title VI, the very different language of § 1981 yields no such plain meaning here. Moreover, since a majority of the Court has construed Title VI (a far more recent Act of Congress than § 1981) to permit federally assisted universities to consider race in ways not forbidden by the fourteenth amendment, it would be surprising if any of them were now to conclude that § 1981 disallows what the fourteenth amendment and Title VI alike are deemed to permit. While one cannot be certain of the outcome, it therefore seems unlikely that § 1981 will foreclose admission policies derived from Mr. Justice Powell's position—for such institutions as may wish to proceed in that fashion.

Conclusion

This brief article is advisedly described as "a preliminary report." It is merely expository, and it will assuredly soon be overtaken by subsequent events. For the time being, it may be the better part of wisdom to attempt nothing larger than some uncertain, small, and immediate conclusions. If the "past futures" of other landmark cases are any sort of reliable guide, one would be quite foolish to try to serve any role more serious than mere amanuensis to the Court: more often than not, the actual future of each such case was utterly different from what its most patient critics had supposed. Frequently, the expanded (or diminished) uses were strikingly different from anything one could conscientiously find solid explanation to account for in the original opinions. The reader may not think so now (deceived as we all are, by hindsight), but this was probably true of *Brown v. Board of Education* itself. Assuredly it was true of *Baker v. Carr*, the original reapportionment case, which gradually emerged with a far more sensational future than was first implied by its several opinions.

Often, "great" cases become so almost entirely because of some subsequent use, more ingenious than faithful in its application of precedent. And nearly as often, of course, seemingly "great" cases become forgotten citations—because of subsequent descriptions which diminish them to the vanishing point. (Perhaps a good example of such a case [which I wager the reader never heard of, and so it serves my point too well] is *Boyd v. United States*, which Mr. Justice Brandeis once called "a case that will be remembered as long as civil liberty lives in the United States." See Note, *The Life and Times of Boyd v. United States* [1886-1976], *Michigan Law Review*, 76 [1978], p. 184.)

Which way *Bakke* will go, therefore, is highly indeterminate. In the meantime, the minimum proposition fairly derived from the case is that racially separate and unequal admissions policies in federally assisted institutions of higher learning are generally forbidden.

Four Justices have reached this conclusion on the basis of an implied congressional resolve pursuant to Title VI of the Civil Rights Act. Mr. Justice Powell locates it in the command of the fourteenth amendment. Additionally, however, he concludes that admissions policies structured in good faith, for the different and more limited objective of enhancing the quality of *lernfreiheit* and *lehrfreiheit* that are the essence of the academic enterprise, will not be foreclosed by a tight and binding pure "colorblind" interpretation of Title VI or the fourteenth amendment. Thus, an educationally defensible policy that takes care to provide a useful degree of ethnic diversity remains within the discretion of both public and private institutions.

If Mr. Justice Powell's distinctions seem too Solomonic, too inclined to cut the use of race into two parts neither half of which is pleasing by itself, it may be more because he is unduly deferential to higher education rather than not deferential enough. Insofar as he (and four other Justices) hold it to be improper for universities to use admissions standards as an instrument of social reform, they but repeat a position frequently urged in other circumstances by many universities. If it is wrong for legislative bodies to deform academic standards by annexing admissions policies to nonacademic uses (as universities themselves have so often maintained), surely it is far less defensible for such institutions themselves to appropriate the public's largesse for political purposes. At least a strong argument can be made to this effect when such actions must necessarily affect the equal opportunity of persons otherwise entitled to share in the resources of such institutions and whose exclusion becomes a foregone certainty as a direct and immediate consequence of such a policy.

From this point of view, Mr. Justice Powell's restraint on self-generated university "affirmative action" plans merely applies to universities the same self-denying ordinance which universities have so often asked of legislatures. Institutions of higher learning that would, by their own practices, advertise the propriety of using their admissions standards for nonacademic objectives, may assuredly expect difficulty in thereafter resisting legislative bodies quite ready to act generally on that kind of concession. Within the academy itself, moreover, the principle once having been established, it is to be expected that others will press forward as well. In brief, far from being antagonistic to higher education, this branch of the Powell opinion may well be seen hereafter as highly protective of higher education.

On the other hand, to the extent that the door is left ajar to take any account of race (albeit only insofar as the failure to do so may deprive the institution of perspectives and experiences which are educationally germane and which are simply not captured by reliance on other factors [e.g., economic adversity]), while it leaves Justice Powell's position wholly consistent overall, it does introduce a number of problems to which the answers are not clear. For one thing, Mr. Justice Powell clearly implies that even this use of race as a limited "plus point" factor is allowable only when race is but

one of several kinds of nonacademic attributes, *each* of which is also used to achieve a broader heterogeneity within a given student body. But logically, other than as a mere device to make it easier to police the integrity of a given plan, there seems to be little reason to add this requirement. If it is the educational pertinence of race that makes its "plus point" use sufficiently important to escape condemnation by the equal protection clause under the circumstances, surely that pertinence is not logically lessened simply because no other varieties of nonacademic attributes (e.g., age, geographic origin) were regarded in the same way. Even supposing that some may believe such other types of differences are at least equally germane in their own way (a matter itself readily susceptible to reasonable differences of opinion), it has not generally been a requirement of equal protection that government must address all parts of a given problem as a condition of addressing any part of that problem. To the contrary, the case law is entirely the other way. In this respect, then, Mr. Justice Powell's requirements respecting the institutional use of race in achieving a reasonable degree of ethnic diversity contributory to the educational functions of the university may be unduly severe—and not explicable under the equal protection clause on which he relied.

For another, Mr. Justice Powell's deference to higher education may assume more than those in higher education are frankly able to show. The claim that ethnic diversity within a student body *is* important to the overall quality of the university is often asserted, highly plausible, almost certainly true—and yet extremely vulnerable. By no means have we undertaken to prove the claim in any fashion that would ordinarily be required otherwise to sustain the use of a "suspect classification." By no means are most institutions in a position to rationalize the particular number or percentage of ethnically diverse students they desire on such a basis, or to defend the degree of "plus point" emphasis given to this kind of diversity vis-à-vis other kinds. The solicitude thus displayed in Mr. Justice Powell's analysis for the special relevance of race to the educational functions of universities, while genuinely gratifying, is probably more generous than we might ourselves think constitutionally tolerable if it were instead granted to noneducational public bodies.

Taken on broader terms still, moreover, the position is also vulnerable to the criticism that Robert Bork has offered. (*Wall Street Journal*, July 21, 1978, p. 8). Professor Bork finds it at least as plausible that in some circumstances "a university could believe that education is more effective under conditions of genuine homogeneity and so count against applicants, among other factors, the fact of being black, female, Chicano, etc. Nobody supposes for a moment that such a policy, however sincerely adopted, would be shielded . . . from the fourteenth [amendment]." One need not read the Powell opinion in nearly so permissive a fashion, of course; presumably something more than the institutional assertion of a good-faith belief in such a proposition would surely be demanded. Still, even regarded

more moderately, Professor Bork has a strong point which underscores the weakness just noted: exactly what evidence are those of us who would grant "plus points" on the basis of race prepared to provide in demonstration that we have hard evidence, and not just a good-faith belief, that ethnic diversity within a student body is educationally significant? If, moreover, Mr. Justice Powell's deference to higher education does indeed stand on a wholly neutral application of the equal protection clause, would he be prepared to sustain a system of "plus points" assigned to produce an ethnically homogeneous public college student body if that college furnished equivalently convincing evidence in the educational defense of its policy?

Behind criticisms such as these (many more of which must doubtless appear as the case is explored elsewhere), I think there is a constitutional issue that will indeed present extremely great problems in the aftermath of the *Bakke* case. The problem, stated in terms of Mr. Justice Powell's own address to the proper constitutional standard, is this. Mr. Justice Powell treats *all* racial classifications (and not simply those disadvantageous to historically disfavored groups, whoever that may include) as constitutionally "suspect." Accordingly, such classifications are to be sustained only if they survive "the most exacting judicial scrutiny," a standard ordinarily demanding that the public necessity for such a classification be more than merely reasonable—but that it be very great indeed. Yet, in the dispensation the Powell opinion provides to higher education, the purpose to be served, as important as educators may deem it to be, is at best a purpose to furnish a better learning environment for all of the students—a purpose not exactly overwhelming or even nationally compelling.

Dissenting in *DeFunis v. Odegaard* (416 U.S. 312, 320, 341, 343 [1974]), the precursor to *Bakke* (dismissed for mootness), Mr. Justice Douglas anticipated this problem and declared:

The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. [The *DeFunis* case involved a state law school admissions policy quite similar to the one in *Bakke*.]

.....
If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality.

That way of putting the matter, that there is "an accordionlike quality" built into the Supreme Court's superintendence of the shifting, changing, but never-ceasing insistence by government to use race in one way or another, describes the essence of the problem very well. There was, however, even as the Court itself noted, no party to the case nor even a single *amicus* prepared to assert the view that "our constitution is color-blind" and "does not . . . permit any public authority to know the race of those entitled to be pro-

ected in the enjoyment of . . . civil rights, common to all citizens." (Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 552, 554, 559 [1896]).

The fact is that we somehow remain incorrigibly optimistic about the capacity of our political processes to generate explicitly racial decisions less dubious than virtually all such decisions that have characterized our history. The Supreme Court is evidently inclined even now to be deferential to that permissive view of the fourteenth amendment. Perhaps still another half-century from now we can say better whether that kind of optimism and that kind of deference were sound.

A Postscript on the Brennan Opinion: The Constitutionality of Universal Racial Quotas.

It may strike the reader as curious that the few critical remarks advanced in this article have been directed only to Mr. Justice Powell's opinion—despite the fact that the opinion written by Mr. Justice Brennan spoke for four times as many Justices (and thus may be far more likely to become the prevailing view on the constitutional issue). I have no very good excuse for that omission, except that the view advanced by Mr. Justice Brennan was one which had been repeatedly put forward (and just as often criticized) elsewhere—a matter not true of Mr. Justice Powell's view, which therefore seemed worthwhile to examine here. Because I am reluctant to review still again all that has already been said by others in urging upon the Court the view adopted by Mr. Justice Brennan (and Justices White, Marshall, and Blackmun), I think it is simply more appropriate to deal with it briefly, as an extended postscript. In that way, these few observations will carry no pretense that they are either original or exhaustive.

If Mr. Justice Powell's opinion is properly subject to the mild criticism that at its edges, it has "an accordionlike quality," that difficulty is magnified in the vastly more permissive standard of judicial review urged in the Brennan opinion. Here, the door is not merely ajar for racial classifications: it is opened so wide that there may issue wholesale political licenses for racial quotas in nearly every avenue of public life. Essentially, the proposed constitutional standard is that the government may use racial double standards whenever they are "designed to further remedial purposes." The scope of racial quotas which may be targeted pursuant to this test is evidently very broad. It may best be seen in comparison with a much more limited use of such standards "for remedial purposes."

In his dissenting opinion in *DeFunis*, Mr. Justice Douglas noted that the use of standardized admission tests may work an inadvertent unfairness to minority applicants: it is entirely possible that a test instrument generally effective in forecasting the likelihood of students to do more or less well in a given field of graduate study may be ineffective (or at least less effective) in respect to identifiable ethnic cohorts within the total group. He suggested, therefore, that insofar as a given admissions criterion were flawed in this respect, i.e., when applied indiscriminately to all students, utiliza-

tion of different or supplemental criteria more responsive to identifiable subgroups would be wholly constitutional.

The use of such additional and/or different criteria for ethnic minority applicants, under such circumstances, would be "remedial" and yet not "discriminatory." They would be remedial of defects discovered to exist within the general test insofar as the indiscriminate application of that test to ethnic minorities could be shown to "underpredict" their actual graduate school performance when admitted to the same curriculum and when examined on equal terms with all other admittees. They would not be discriminatory, however, insofar as the use of the different (or additional) criteria for ethnic minorities merely achieves the same degree of reliability of prediction for them as is already achieved by the general test as applied to all others. Indeed, in the *DeFunis* case itself, while wholly disapproving the University of Washington's "justifications" for its racial dual admission standards, Mr. Justice Douglas voted to remand the case—to provide the university with an opportunity to show that its racially differentiated standards were, if only by coincidence, defensible in these terms.

Unquestionably, racially explicit separate standards "designed to further remedial purposes" in this limited and specific sense, are clearly constitutional. Indeed, under at least one federal statute they are, in certain circumstances, already required as a matter of federal law. Thus, Title VII of the Civil Rights Act of 1964 (applicable to all employers of fifteen or more employees) has been construed to require that insofar as an employer's hiring or promotion standards tend in the first instance to exclude a disproportionate percentage of ethnic minority applicants, those standards must be re-examined to determine whether they are inadvertently "discriminatory" in the sense just explained. If they are, the employer must supplement them with, or substitute for them, criteria as separately validated in their application to minority applicants as are the criteria applied to other applicants.

At the same time, it is quite clear that "affirmative action" of this kind is both legal and constitutional when voluntarily undertaken by a public or private enterprise (including a college), even when not required either by the fourteenth amendment or by any other law. Indeed, the legitimacy of such an approach is obviously not confined only to instances when disproportionately few ethnic minority students might otherwise be admitted. It is entirely possible that a given test or standard "underpredicts" the probable performance of such persons who, given the just benefit of a correction in that standard, would as a group fare even *better* than the "average." Assuredly, nothing in the concept of equal protection suggests that their equality of opportunity as individuals should be restricted by any notion that their chance for admission on merit should be artificially restricted by the proportion of persons of their same race in the population at large or the population of applicants.

If this example either exhausted or illustrated what Mr. Justice Brennan meant by acknowledging the constitutional propriety of race-related differential admission standards "designed to further remedial purposes," it would surely be uncontroversial. If standard admissions criteria inadvertently carry built in headwinds against individuals whose equal or superior capabilities or motivation are being unfairly overlooked (because of oversights in the instruments used to compare them with other applicants), they should surely be modified; their maintenance provides an unjust advantage to others and denies the university what it meant to have.

The use of racially differentiated standards "designed to further remedial purposes" in this corrective way, however, is not at all what the Brennan opinion intends. Rather, the view of "remedial purposes" is utterly different. It is that racial double standards are permissible not to remedy any defect inherent in the uniform application of a single admissions standard—but useful, rather, to furnish a cohort of less qualified students to fill a minimum racial quota which the university deems to be appropriate in the amortization of the national racial debt. Succinctly stated, it is the object of the arrangement to inaugurate a limited example of race reparations pursuant to which a scarce public good is to be divided among racial groups, with applicants from "victimized" groups to be considered more permissively as a means of redress for that antecedent victimization.

The effect of such arrangements is necessarily to displace certain persons from positions and from opportunities they would otherwise have filled but for which they are now rendered ineligible because they are (a) white and (b) not sufficiently better qualified than all other whites as to be safely beyond the exclusionary effect of the racial minority set-aside quotas. The theory according to which it is thought reasonable to proceed in this fashion is that all persons for whom the racial set-asides are reserved are more deserving (whether or not substantially less qualified) than any person displaced by the arrangement in at least one important respect: racial victimization—if not personally and directly (which need not be shown), then at least impersonally and indirectly (which may safely be assumed), through three centuries of white racism in American history. And so the opinion by Mr. Justice Brennan advances accordingly:

[I]t is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

And thus:

True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—not less than their proportion of the California

population—of otherwise underrepresented qualified minority applicants.

Viewed head on, as a *modus operandi* for the amortization of the national racial debt, without doubt there is much about the Davis plan that is plainly repugnant. For one thing, it represents a most peculiar view of apportioning the burdens of providing racial restitution. The “benefits” of that racism for which the Davis plan presumes to make partial group restitution are diffused in the “unjust” enrichment of all white Californians including most certainly the engineers of this compensatory scheme, i.e., the (predominantly white) faculty and administration of the Davis medical school. Yet the overwhelming majority of all such white persons give up *nothing* in contribution to the amortization of that debt. They pay no higher taxes, the faculty teach no greater loads, they supervise no larger number of students, they personally forego no perquisites or emoluments, and indeed may themselves even *profit* from their own plan—insofar as it provides them with an enhanced sense of self-esteem and peer-group approval. Rather, the Davis plan presumes to impose 100 per cent of the “debt” it is to amortize on a hapless number of impersonally chosen surrogates from whom admission-gate transfer payments are thus to be made. The Allan Bakkes and Marco DeFunises *alone* step aside.

There is, of course, no evidence that any of them benefited disproportionately (if indeed at all) from the racism it is now their exclusive distinction to amortize; there is no evidence that any of them are better able to afford the cost than others. More likely persons than Bakke would, surely, include highly favored students accepted at *several* schools and not just a near miss at Davis (as was Allan Bakke)—but in fact none of them (nor any other citizen or taxpayer or officeholder in California) pays anything. More likely persons than Bakke would, surely, include persons so cushioned by family connection that even exclusion from every medical school is no lasting hardship—as Bakke was not cushioned (not, at least, by family connection, as he came from a working-class family [his father was a postman]). In brief, the Davis plan as an engine for amortizing the national racial debt is a zero-sum game which arbitrarily disadvantages a few whites very greatly indeed and no one else at all, a system of racial transfer payments enforced at the gates of a state university medical school.

Appraised calmly, moreover, it is not surprising that both Allan Bakke and Marco DeFunis came from working class families. Demographically, that is in keeping with what the faculty and administration at Davis should anticipate. The system of racial transfer payments is perfectly calculated to dissipate its entire impact on otherwise “marginal” white applicants, i.e., those from circumstances least profiting from the antecedent racism in America and among the least able to pay that debt. So it is, too, in virtually every other area where like proposals are entertained—a matter perfectly well understood by them and quite adequately

explaining the high degree of resentment that whites at the margin entertain to the *noblesse oblige* of Davis-type plans.

Yet Mr. Justice Brennan has a reply to these very objections, and perhaps he is quite right:

If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admissions at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis’s special admissions program.

Viewed that way (and it is not an unreasonable way), the Davis plan itself is *not* flawed. Rather, insofar as the objection I have sought to raise still has any force, it is only an objection to the incompleteness of the system. What is “needed” is not the dismantling of the Davis plan, but rather its systematic imitation and duplication *in every other area of public life as well*. If an Allan Bakke would have failed to qualify but for the effects of past discrimination which explains the disproportionate failure of minority applicants to have done as well or better than he, it is surely likely that this is equally true not just at the margin of competition for access to the Davis medical school—but at the margin of competition for all jobs, for all government contracts, etc., including appointment to the Davis faculty (and competition for scarce space in the publication of articles in professional journals), *everywhere* for *everything* currently allocated by mere standards of competitive excellence rather than such standards as uniformly modified by compensatory racial minority set-asides.

The more subtle “problem” (if there is a problem, for some do not see any) of the Brennan rationale, therefore, is in its very doubtful destiny as an instrument to end racism in the United States. The law, even as the Supreme Court noted in *Brown v. Board of Education*, is a powerful educative source. It communicates a sense of what is right, it inculcates habits of thought, quite apart from the coercion it may impose. In the *Bakke* case, the Brennan opinion is at pains to insist that although the Davis plan plainly favors less capable students over more capable students differentiated basically by race, those to whom these transfer payments are made are not “stigmatized” by the auspices of their special admission and assuredly they have no reason to feel “grateful.” Far from being patronized, what they get is, rather, a matter of simple justice: a matter of just racial redress. They do not “take” from an Allan Bakke, for such a view is itself rife with white racism: it unacceptably assumes that whites affected adversely by the plan had something properly to be thought of as “theirs.” Davis has assured them that this is not so. Mr. Justice Brennan assures them that Davis is reasonable in saying so. If both are right, they are at least equally right in every other category and every other walk of life in America. In brief, it is at once wrong and unconscionable *not* to provide systematic racial minority set-asides *elsewhere*, fixing target quotas to be filled by less

rigorous standards applicable only to disadvantaged racial minority persons, as an equitable and broadly distributed means of amortizing the national racial debt.

Generalized as a standard of constitutional review, the maxim of the Davis plan is thus one that emphatically inculcates not colorblindness but extraordinary race-conscious restructuring of some indefinitely "transitional" social order by state and national systems replicating whole tiers of racial quotas. A plurality of four Justices of the United States Supreme Court thus finds congenial to the Constitution a theory of racial quotas and racial double standards quite sufficient to fuel a generation or more of ethnic politics under a new order which will consciously distribute opportunity in this country by explicit racial percentages and specific ethnic classifications.

Yet it is the firmly held view of many persons (to use the language employed by Mr. Justice Blackmun in his opinion fully concurring with Mr. Justice Brennan) that "in order to get beyond racism, we must first take

account of race" in precisely this fashion. It is seriously suggested that at some future time, presumably when the racial national debt will have been appropriately amortized, race consciousness may at last be encouraged to fade from each person's thinking under a Constitution which at last shall be construed "*not* to permit any public authority to know the race of those entitled to be protected in the enjoyment of civil rights, common to all citizens." That the contemplation of this transitional society, with its established layers of racial quotas, could truly be thought by anyone as more likely to eradicate race-consciousness, racial politics, or racism in the United States than any other alternative available, and not itself to become a permanently entrenched feature in an utterly race-conscious America, seems to be perfectly remarkable. But I sincerely hope that I am wrong, because this view of the matter is on the very edge of becoming the prevailing view of what will pass as the enlightened application of "equal protection of the laws."

The Anatomy Lesson

October.

On eight stainless steel tables eight long packages lay
Each shrouded in green toweling; each wrapped in
Clear plastic.

We unwrap our gifts with care
And as we lift the covers
My students are probably thinking
Grandpa or Grandma,
Uncle Max or Aunt Sadie.

I remember my father, wasted by cancer.
The last time I saw him he didn't see me,
His face dull silver against white sheets.

I try not to see my mother.
So many of her friends are here.

For a moment
I see myself.

All through the winter I'm enthralled.
Captured, bound, enfolded.
Awake, asleep, my thoughts shuttle back and forth
Weaving a tangled plexus of science and sentiment.

Day by night and night by day
These bodies surrender their secrets.

Day by night and night by day
These bodies tug at my lab coat and whisper,
"Live."

George J. Fruhman
Albert Einstein College of Medicine